EXHIBIT 2
DATE 2-13-07
HB HB 597

HON. JEFFREY H. LANGTON
District Judge, Department No. 1
Twenty-first Judicial District
Ravalli County Courthouse, Suite A
205 Bedford Street
Hamilton, MT 59840-2853
Telephone: (406) 375-6780
Fax: (406) 375-6785

FILED
DEBBIE HARMON, CLERK
OCT 10 2006
DEPUTY

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

RAVALLI COUNTY, MONTANA,	)	Department No. 1
	)	
Plaintiff,	)	Cause No. DV-02-167 / 26
	)	
-vs-	)	**OPINION & ORDER**
	)	
DALLAS ERICKSON,	)	
	)	
Defendant.	)	

This matter comes before the Court upon a *Motion for Summary Judgment* filed by Plaintiff Ravalli County, Montana ("County"), represented by Ravalli County Attorney George H. Corn and Deputy Attorney D. James McCubbin. The County seeks a determination pursuant to § 7-5-135, MCA, as to whether two proposed ordinances would be valid and constitutional if enacted by the voters of the County. Defendant Dallas Erickson ("Erickson"), represented by Bridgitt Erickson, Esq., of Lincoln, has responded to the motion. The parties have waived their right to oral argument. The motion is ripe and ready for ruling.

The County has failed to support its claim that the proposed Obscenity ordinance would violate the right to privacy by banning obscene materials in private settings between consenting adults. This portion of the motion is without merit.

F. Conclusion

The Court concludes that the proposed Obscenity ordinance, if enacted by the voters of Ravalli County, would not be invalid, unconstitutional, or unenforceable.

II. IF ENACTED, WOULD THE PROPOSED ORDINANCE ADDRESSING THE DISPLAY AND DISSEMINATION OF MATERIAL HARMFUL TO MINORS BE VALID AND CONSTITUTIONAL?

The proposed Displaying or Disseminating Material Harmful to Minors ("Harmful to Minors") ordinance attached as Exhibit B contains five subsections somewhat similar to § 45-8-206. Following the recitals to the proposed ordinance is a declaration that the ordinance shall be in full force and effect in all of Ravalli County, Montana.

Subsection (1) defines the term "harmful to minors." The term is defined similarly to the *Miller* test with a significant distinction: the proposed ordinance shifts the focus of the three requirements of the *Miller* test from an average/reasonable person standard to an average/reasonable person standard with respect to minors. In other words, the test is based (1) not on what appeals to the prurient interest of adults, but what the average adult determines appeals to the prurient interest of minors; (2) not on what the average adult finds patently offensive sexual conduct, but what the average adult finds patently offensive sexual conduct with respect to what is suitable for minors; and (3) not on what a reasonable person finds lacks serious literary, artistic, political, or scientific value, but what a reasonable person finds lacks serious such value for minors. This standard is based on the United States Supreme Court holding in

Ginsberg v. New York, 390 U.S. 629 (1968). *See* recitals to proposed ordinance. The somewhat corresponding statute, § 45-8-206, utilizes a similar standard of "obscene material to minors."

Subsection (2) sets forth three prohibitions regarding the public display or dissemination of materials to minors that are similar to the prohibitions in the corresponding state statute. One difference is the substitution of the statutory "obscene material to minors" standard for a "harmful to minors" standard in the proposed ordinance. The second difference is that the proposed ordinance is directed at "a person, having knowledge of the character or nature of the material," whereas the statute is limited to "a person having custody, control, or supervision of any commercial establishment or newsstand."[29] Thus, on its face, the proposed ordinance casts a much wider net than does the statute. The proposed ordinance alters the definition of what is prohibited from display or dissemination and applies to all persons with knowledge of the nature of the material.

The recitals to the proposed ordinance state in relevant part: "Whereas, The public display or distribution of material harmful to minors to minor children [sic] constitutes a public offense and presents a danger to the health, safety and welfare of the children of the County of Ravalli . . . ," which would indicate that the intent of the ordinance is to regulate the "public display or distribution of material harmful to minors." By this language, anyone, whether engaged in a commercial or noncommercial act, including teacher, librarian, museum curator, or person in the medical field, who has publicly displayed or distributed material that is determined to fall within the "harmful to minors" definition, may be liable under this offense.

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[29] The earlier "Displaying Material Harmful to Minors" ordinance passed in 1994 and declared unconstitutional in 1999 was directed, like the statutory offense, at a person having custody, control, or supervision of any commercial establishment or newsstand.

Subsection (3) provides a single exclusion whereby a person displaying or disseminating obscene material does not violate this section: "if he/she had reasonable cause to believe the minor was 18 years of age." This corresponds with § 45-8-206(2)(a), MCA. However, the additional four exclusions in the state statute—actions undertaken for educational purposes, in the capacity of public libraries or museums, for scientific or medical purposes, and as retail sales clerks with no financial interest in the obscene material, are eliminated from the proposed ordinance. Thus, persons acting in any of the above capacities are not exempted from prosecution for violation of this proposed ordinance. (The motion picture theater employees exemption codified at § 45-8-203(2) would still apply, however.)

Subsection (4) sets forth an exemption that is not provided under state law: the exemption of a parent or guardian who distributes material harmful to minors to his child or ward, or permits his child or ward to attend an exhibition of material harmful to minors if the child or ward is accompanied by the parent or guardian. The proposed ordinance specifically states that it should not be construed to encourage or condone such consent, and nothing in the ordinance shall prohibit the prosecution of a parent or guardian who displays or distributes any material for sexual purposes.

Subsection (5) is a severability clause.

Oddly, there is no penalty for violation of this proposed ordinance. Whether this omission was deliberate or unintentional is unknown. The previous obscenity ordinance submitted by Erickson and passed in 1994 contained a penalty provision. The corresponding state statute codified at § 45-8-206 contains a penalty provision codified at § 45-8-208.

In summarizing the similarities and differences between the proposed ordinance and the corresponding statute, the Court notes the two similarities: (1) both define the material prohibited by using tests that focus not on the prurient interest, patent offensiveness, and lack of serious values as determined by adults, but as determined by adults with respect to minors, and (2) the offenses are identical except for the substitution of the "harmful to minors" test for the statutory "obscene material to minors" test.

As for the differences, the proposed ordinance applies to everyone who has knowledge of the nature of the material and is not restricted to persons in charge of commercial establishments or newsstands. The proposed ordinance eliminates the exemption for persons acting in a capacity related to educational institutions, libraries, and museums who are acting in accordance with policies approved by the governing board of the institutions. It eliminates the exemption for nude exhibitions for bona fide scientific or medical purposes for bona fide schools, libraries, or museums. It eliminates the exemption for retail sales clerks who have no financial interest in the material or performance or in the establishment displaying or selling the material or performance. It eliminates the requirement for a warning prior to prosecution that the corresponding statute contains at § 45-8-207. However, the proposed ordinance provides no penalty for violation.

A. Is the proposed ordinance overbroad and beyond the scope of § 45-8-201(5)?

The County argues that the proposed ordinance is overbroad and beyond the scope of § 45-8-201(5) on the basis that it seeks to restrict expressive materials that do not fall within the definition of obscenity codified at § 45-8-201. However, the corresponding statute likewise incorporates a definition of "obscene material to minors" that does not fall within the definition of obscenity codified at § 45-8-201. Both the proposed ordinance and the statute prohibit a much

broader spectrum of materials than does § 45-8-201 because both utilize definitions that adjust the standard test for obscenity from the viewpoint of the adult to the viewpoint of an adult with respect to a child, in accordance with *Ginsberg*.

However, the proposed ordinance has another problem. The statutory terms incorporated into § 45-8-206 are defined in § 45-8-205. The term "display or dissemination of obscene material to minors," defined at § 45-8-205(1), is the standard incorporated into § 45-8-206 to describe the offenses prohibited by § 45-8-206. This definition contains the following value prong qualification:

> If the court finds that the material or performance has serious literary, scientific, artistic, or political value for a significant percentage of normal older minors, the material or performance may not be found to lack such value for the entire class of minors.

§ 45-8-205(1)(c). A county may adopt an ordinance pursuant to § 45-8-201(5) which makes the provisions of § 45-8-201 and 206 more restrictive as to obscenity. However, the terms used in § 45-8-206 that are defined in § 45-8-205 may not be made more restrictive—there is no statutory authority that allows a county to adopt an ordinance as to obscenity that is more restrictive than the provisions of § 45-8-205. By substituting a different standard—material that is "harmful to minors"—for the corresponding statutory standard of "display or dissemination of obscene material to minors," the proposed ordinance has exceeded the scope of § 45-8-201(5) by further restricting the definition in § 45-8-205(1). By eliminating the applicable statutory definition of "obscene material to minors" and the above value qualification codified at § 45-8-205(1) and substituting a more restrictive definition, the proposed ordinance impermissibly exceeds the scope of § 45-8-201(5) by amending a statute other than § 45-8-201 or § 45-8-206. Thus, on the

basis of statutory construction, the Court concludes that Section (1) of the proposed ordinance is invalid and illegal.

The severability clause in Section (5) provides that any invalidity of a section or provision of the ordinance shall not affect any other provision or application of the ordinance which can be given effect without the invalid section. Section (1) is invalid and must be severed from the ordinance. Because the impermissible and invalid definition in Section (1) is used to define the proposed ordinance's offenses set forth in Section (2), the Court concludes that Section (2) cannot be given effect. The proposed ordinance's use of the impermissible definition "harmful to minors" for material that is obscene is fatal to the Harmful to Minors ordinance. But because the ordinance provides no penalty for violation, a conclusion that the ordinance is illegal and invalid has no substantive effect.

B. Is the proposed ordinance unconstitutional?

The County argues that the proposed Harmful to Minors ordinance impermissibly burdens intrastate exercise of free expression, is unconstitutionally vague, and violates the First Amendment to the United States Constitution. Because the Court has already determined that the Harmful to Minors ordinance is illegal and invalid on the basis that it has impermissibly exceeded the scope of § 45-8-201(5), the County's remaining arguments are moot.

The County's motion should be granted as to the proposed Displaying or Disseminating Material Harmful to Minors ordinance.

CONCLUSION

The Court concludes that the proposed Obscenity ordinance, which is more restrictive than the corresponding state statute codified at § 45-8-201, restricts the distribution of obscene

material within the scope of § 45-8-201(5) and would not be invalid, illegal, or unconstitutional if enacted by the voters of Ravalli County. Accordingly, this portion of the County's motion for summary judgment should be denied.

The Court further concludes that the proposed Displaying or Disseminating Material Harmful to Minors ordinance, which is more restrictive than the corresponding state statute codified at § 45-8-206, restricts the distribution of obscene material beyond the scope of § 45-8-201(5) because it impermissibly changes the definitions codified at § 45-8-205. Therefore, the proposed Displaying or Disseminating Material Harmful to Minors ordinance would be invalid and illegal if enacted by the voters of Ravalli County. Accordingly, this portion of the County's motion for summary judgment should be granted.

ORDER

IT IS THEREFORE ORDERED that Plaintiff Ravalli County's *Motion for Summary Judgment* is hereby **DENIED** as to the proposed Obscenity ordinance.

IT IS FURTHER ORDERED that Plaintiff Ravalli County's *Motion for Summary Judgment* is hereby **GRANTED** as to the proposed Displaying or Disseminating Material Harmful to Minors ordinance.

DATED this 10th day of October, 2006.

HON. JEFFREY H. LANGTON, District Judge

cc: counsel of record

I certify that I forwarded copies of this instrument to counsel of record

October 10 2006
Debbie Harmon, Clerk
By: Deputy